Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-981

M.R.T.S., INC., a California Corporation,
dba CLASSIC CAT THEATER,

Appellant,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA; and ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA

MOTION TO DISMISS APPEAL

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Appellees.

MOTION TO DISMISS APPEAL

Appellees move the Court to dismiss the appeal herein on the ground that no substantial federal question is presented by the appeal in light of the Court's decision in *California v. LaRue,* 409 U.S. 109 (1972).

INTRODUCTION

The opinion of the Alcoholic Beverage Control Appeals Board of the State of California, attached to the Jurisdictional Statement as Appendix B, adequately sets forth the factual and procedural matters which have transpired. The opinion of the Court of Appeal of the State of California, attached to the Jurisdictional Statement as Appendix C, accurately represents appellant has sought and exhausted its state judicial remedy.

ISSUE

Did appellees, the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board of the State of California, violate appellant's constitutional rights by suspending its license to dispense alcoholic beverages following appellant's violation of appellee's Rule 143.3 proscribing naked dancing in premises licensed by appellees to dispense alcoholic beverages?

WHY THE COURT OF APPEAL WAS CORRECT

CALIFORNIA V. LA RUE CORRECTLY HOLDS THAT NAKED DANCING IS PROPERLY THE SUBJECT OF STATE ALCOHOL REGULATION WHEN SUCH CONDUCT OCCURS IN LICENSED PREMISES.

Appellant apparently asserts that conduct, including naked dancing in bars licensed to sell alcoholic beverages, can not be constitutionally regulated by state liquor authorities. In making this assertion, appellant contends that *California v. LaRue,* 409 U.S. 109 (1972) has been repudiated by this Court's decision in *Craig v. Boren,* 429 U.S. 190 (1976). Appellant's contentions are without merit and misconceive not only the authority left to the states by the Twenty-First Amendment, but the nature of the allegedly protected interest herein involved.

Initially, this Court's decision in *California v. LaRue,* upheld the constitutionality of appellee's Rule 143.3 proscribing naked dancing in licensed bars. In so holding, this Court recognized that the challenged regulation dealt solely with "licensing bars and nightclubs to sell liquor by the drink" and not the censorship of dramatic performances. The Court examined both the authority left to the states by the Twenty-First Amendment and the state's legitimate interest in eliminating untoward conduct taking place in and around its licensed premises. Finally, the Court noted the Twenty-First Amendment did not supersede other provisions of the Constitution, but rather, "strengthened" state alcohol regulation where addressed to concrete problems

demonstrably affecting the health, welfare, and morals of its citizens.

By its appeal, appellant suggests the Court did not mean to so hold. Yet appellant fails to consider the Court's reaffirmation of its decision in *California v. LaRue* in later cases; makes the identical First Amendment assertions adequately and fully addressed in *California v. LaRue* and its progeny; and misconceives the Court's decision in *Craig v. Boren.*

In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975) this Court addressed regulations involving "topless" dancing. Its author, Mr. Justice Rehnquist, had occasion to restate the holding in *California v. LaRue* in the following language:

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue,* 490 U.S. 109, 118, [93 Sup. Ct. 390, 397, 34 L.Ed.2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program."

See also *City of Kenosha v. Bruno,* 412 U.S. 507 (1973). Following the Court's decision in *California v. LaRue,* the

Ninth Circuit in *Richter v. Dept. of Alcoholic Beverage Control,* 559 F.2d 1168 (9th Cir. 1977) (*Cert. Denied* No. 77-758, Jan. 23, 1978) discussed the identical issue advanced by appellant. In affirming the licensee's failure to raise a substantial constitutional question, the court in *Richter* relied on *California v. LaRue* and later decisions of this Court including *Young v. American Mini Theatres,* 427 U.S. 50 (1976).

The decision in *Richter* is particularly instructive in light of the licensee's allegations involving expression allegedly protected by the First Amendment. The court recognized that criticism existed viewing *California v. LaRue* as "seemingly inconsistent" with the First Amendment. The Court stated:

> "However, as emphasized by the Court in *LaRue,* the focus of our inquiry should not be directed to the restriction of access to the particular form of expression herein, but rather must be directed to the restriction of the viewer's access to liquor. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in certain locations, specifically in the context of the commercial exploitation of both the expression delineated in the regulations, which may be protected by the First Amendment, and the sale of liquor, which is within the state's power to control. Nude dancing as the type performed in appellant's establishment, is not the subject of the prohibition, rather it is the sale of alcoholic beverages." (At page 1172.)

In the present matter, appellant continues to premise its assertions on the assumption that naked dancing is entitled to the same First Amendment protections as more traditionally protected speech. In *California v. LaRue*, the Court recognized that theatrical productions are within the protection of the First and Fourteenth Amendment:

> "But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." (At page 117.)

In dismissing the assertion that all lewd or naked dancing was nonetheless protected expression, the Court in *California v. LaRue* quoted from *United States v. O'Brien*, 391 U.S. 367 (1968) as follows:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (At page 376.)

In *Crownover v. Musick*, 9 Cal.3d 405 (1973), the California Supreme Court was faced with similar First Amendment assertions in its review of county and city ordinances proscribing "topless" and "bottomless" entertainment. Following a thorough review of this Court's decisions relating to protected expression, the court concluded that all conduct should not enjoy the protection afforded speech by the First Amendment stating:

> "The service of food and beverages is a commercial activity. It entails nothing of a communicative nature in the constitutional sense. Nothing about it calls for the protection given speech in order 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' (*Roth v. United States, supra*, 354 U.S. 476, 484 [1 L.Ed.2d 1498, 1506].) This ordinary business activity is not transformed nor elevated into constitutionally protected speech or expression merely because the waiter or waitress is unclothed. Such business conduct does not become 'symbolic' and thus 'communicative' in the constitutional sense because it occurs in 'topless' or 'bottomless' fashion. Such nude activity is nothing more than a commercial exhibition designed to stimulate the customer and promote sales." (At pages 423-424.)

Even assuming that naked dancing, in and of itself, is constitutionally protected expression, proper state regulatory authority, even in the absence of the Twenty-First Amendment, may properly limit such conduct. This Court reaffirmed the permissible limitation of protected conduct in *Young v. American Mini Theatres* in which a Detroit ordinance regulating the location of an adult theatre was challenged. The Court held, *inter alia*, that the regulation of the place where films depicting sexual activities could be shown did not offend the First Amendment. While it is submitted that *Young* did not involve the Twenty-First Amendment, appellees respectfully assert the principle is nonetheless applicable: A state may regulate the place

where certain conduct, including protected expression, can occur so long as it proceeds in a reasonable manner and has a rational basis for its regulation. If, as in *Young,* a local ordinance restricting to some degree the exercise of protected conduct can be held inoffensive to the Constitution upon general police power bases, the "added presumption" afforded the state by the Twenty-First Amendment, and referred to by this Court in *LaRue,* is logical and consistent.

Finally, appellant fails to discuss the "critical fact" that appellee's Rule 143.3 is not comprehensive as were those reviewed in *Crownover* which banned all such nude entertainment "across the board." Appellee's rule only prohibits the sales of alcoholic beverages where certain described conduct is permitted to take place. This distinction is "critical" in that, by its very terms, appellee's Rule 143.3 is therefore arguably immune from overbreadth allegations, and specifically directed to particular conduct found to substantially affect the health, welfare, and morals of the state's citizens.

Consequently, while there may be limitations of some protected expression imposed by the state alcohol regulation,

> ". . . [T]he critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." (*California v. LaRue* at page 118.)

Viewed in that light, the nature of the expression allegedly protected by the extensive and often worn umbrella of the First Amendment may not be viewed in a vacuum, but rather,

in light of the state's interests in regulating the use and consumption of alcoholic beverages within its borders. Appellee's solution to the extensive and often sordid occurrences taking place in and around its licensed premises, admittedly prophylactic, is both reasonable in approach, and rational in effect. The Court in *California v. LaRue* found appellee's rule facially constitutional relying in large part on the nature of the expression allegedly protected and the Twenty-First Amendment which confers upon the states "something more than the normal state authority over public health, welfare, and morals."

CALIFORNIA V. LA RUE HAS NOT BEEN REPUDIATED BY *CRAIG V. BOREN*

Appellant premises its entire appeal on the assertion that this Court did not intend to hold as it did in *California v. LaRue* and evidences that assertion by alleging that *Craig v. Boren* repudiates that holding. Appellees respectfully contend this Court's decision in *Craig v. Boren* does not serve to further appellant's arguments.

In *Craig,* the Court invalidated two Oklahoma statutes which provided for gender-based discrimination in the sale of alcoholic beverages as a denial of equal protection. The Court refused to accept the state's argument that the Twenty-First Amendment somehow saved the statutes from invalidation.

First, *Craig* involved a Fourteenth Amendment challenge to a statute which, on its face, involved "invidious gender-based discrimination." In fact, the effect of the statute yielded no other interpretation. As such, the Court had little difficulty

delineating the constitutional infringement involved. In the present case, there is only marginally protected expression involved in selling liquor through the presentation of naked dancing.

Second, in *Craig*, the state could neither logically, nor practically, legitimize the constitutional infringement. Weak, ineffectual, and apparently unavailable statistics could not justify or satisfactorily identify the state interest involved. In the present case, hearings were held and evidence was taken clearly identifying a sound and legitimate state interest in affording the public some protection from the sordid and often criminal conduct taking place in and around licensed premises.

Finally, in *Craig*, the history and application of the Twenty-First Amendment was extensively reviewed by the Court which stated it had "never recognized sufficient 'strength' in the Amendment to defeat an otherwise *established* claim of invidious discrimination in violation of the Equal Protection Clause." (Emphasis added at 207.)

However, the Court also referred to its decision in *California v. LaRue* and reconciled both decisions by holding, *inter alia*, that an insubstantial constitutionally protected right was outweighed by the state's authority to regulate live entertainment taking place in licensed establishments, and that the Twenty-First Amendment strengthened that authority. As such, appellees submit the decision in *Craig* reaffirms not only *California v. LaRue*, but the principle that the Twenty-First Amendment indeed confers on the states "something more than the normal state authority over public health, welfare, and morals." (*California v. LaRue* at page 114.)

CONCLUSION

For the foregoing reasons the appellees respectfully move the Court to dismiss the appeal herein.

Respectfully submitted,

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